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May 6, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senators Leahy, Kennedy, Kohl, and Durbin in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR EDWARD M. KENNEDY

Just so we fully understand what you said at the hearing, would you confirm, deny or revise the following summary:

1. You may have strong opinions about the correctness of such decisions as Brown, Miranda, and Roe v. Wade, and you may have clear opinions about whether they were examples of judicial activism or strict constructionism as you understand and apply those terms, but you are unwilling to share any of those opinions with us.

RESPONSE: It is my understanding that it is not appropriate for nominees to answer questions seeking their personal views on the correctness of binding Supreme Court precedent. If confirmed, the nominee would be bound to follow the precedent, regardless of whether he personally viewed the precedent as correct, and regardless of whether he personally viewed the precedent as "activism" or "strict constructionism."

For a nominee to offer personal views on binding Supreme Court precedent is improper for several reasons. If such a practice were to be accepted, Senators can be expected to have lists of precedents in areas of particular interest to them, and to quiz nominees on those precedents, in an effort to obtain a forecast of how the nominee will vote on particular questions. As Justice Ginsburg explained in declining to comment at her confirmation hearing on the correctness of Supreme Court precedent:

> **I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. [Hearing, at 494.]**

For a nominee to offer a personal view that, say, the Smith case was wrongly decided also compromises the position of that nominee in subsequent cases in which the applicability of the Smith precedent is at issue. A litigant arguing for the application or extension of Smith before a judge who -- as a nominee -- has explained that he thinks Smith was wrongly decided may well conclude that he has not been treated fairly if the judge rejects those arguments. Lawyers researching cases will not confine themselves to the applicable precedents, but instead feel compelled to scour the transcripts of confirmation hearings, to determine what the judges hearing their appeal think, as individuals, about the correctness of the pertinent precedents. This would undermine the ideal to which Justice Breyer referred during his confirmation hearing for the Supreme Court: "Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that a particular judge is not speaking as an individual."

As I mentioned at my hearing, I have reviewed the transcript of Justice Ginsburg's hearing. She repeatedly declined to comment on her personal views of Supreme Court precedent, citing "the best interests of the Supreme Court." Hearings, at 495. See, e.g., id. at 474 ("[D]o you agree that Maher and Harris, those two cases, were decided correctly? Judge Ginsburg. I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say.") (emphasis added); id. at 542 ("You have cited a decision of the U.S. Supreme Court. I have tried religiously to refrain from commenting on a number of Court decisions raised in these last couple of days."); id. at 557 ("I avoided commenting on Supreme Court decisions when other Senators raised that question, so I must adhere to that position."). Indeed, Justice Ginsburg specifically declined to comment on whether a specific Supreme Court decision was an example of judicial activism:

> My question to you, Judge Ginsburg, is, Do you believe with Justice White that the Supreme Court's decision in the Buckley case was an example of judicial activism into an area that Congress itself should have ruled on?

> Judge Ginsburg. That falls in the same category as the prior question [in response to which Justice Ginsburg "adhere[d]" to her position of "avoid[ing] commenting on Supreme Court decisions"]. You are inviting comment on Supreme Court opinions, or separate opinions, in an area live with business. [Hearing, at 558.]

I believe it appropriate to adhere to the approach taken by Justice Ginsburg in "the best interests" of the federal judiciary.

2. Although it is widely recognized that you were selected through a process which is philosophically, if not ideologically, based, you are unwilling, beyond your generalized commitment to follow binding Supreme Court precedents, to tell us anything meaningful about whether, in your exercise of what you concede is a broad range of judicial discretion, you will or will not live up to the expectations of those who selected you.

RESPONSE: I cannot speak to "the expectations of those who selected" me. I would hope that those involved in the selection process would expect me to be a good judge, one who faithfully discharged the obligation in the judicial oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. If confirmed, I fully intend to do everything in my power to live up to those expectations.

With respect to the process by which I was selected, I was never asked any questions along the lines of the ones I have considered improper to answer during the confirmation process. And I must respectfully disagree that I have been unwilling to offer anything meaningful about my judicial philosophy, beyond a commitment to follow binding Supreme Court precedent. I discussed judicial activism, judicial restraint, and my judicial philosophy in response to Question III.5 of the Senate Questionnaire. I answered questions on those subjects at each of my Judiciary Committee hearings. See, e.g., January 29, 2003 hearing at 181, 197, 199-200, 377-378, 381-383, 417-420; April 30, 2003 Hearing at 28-31, 36-37, 40-43, 56-57, 89-91. And I discussed those subjects at considerable length in responses to both the first round of written follow-up questions, see Senator Kennedy questions 1, 4; Senator

Schumer questions 1, 2, 4; Senator Durbin questions 8, 9, 10, and the second round of written follow-up questions, see Senator Leahy question 2; Senator Kohl question 4.

**RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR PATRICK J. LEAHY**

1. As an attorney in private practice, I am sure that a routine part of your day is spent reviewing conflict of interest checks circulated in your law firm. In your financial disclosure report, you indicate that you own several hundred thousand dollars of Microsoft Corporation stock. I also understand that you served as counsel to the state plaintiffs in the governmental antitrust case against Microsoft, briefing and arguing the states' appeal in the federal Court of Appeals for the District of Columbia Circuit.

A. I am curious about whether you owned Microsoft stock when you argued against the company on behalf of the states?

B. If so, can you provide the Committee with assurances that the possible conflicts of interest suggested by that situation were resolved to the satisfaction of your clients?

C. A few years ago several newspapers reported incidents of federal judges who had failed to recuse themselves from cases involving corporations in which they were invested. In the wake of this controversy some citizens called for all judges to post their financial holdings on the Internet to ensure that they would not preside over a case that involved a conflict of interest. This proposal was never implemented but it highlights the need for all judges to be aware of their own potential conflicts of interest and to be vigilant in recusing themselves as required by statute. If confirmed, what procedures would you implement in your chambers to avoid conflicts of interest considering your current financial holdings?

RESPONSES:

A. Yes.

B. I advised Iowa Attorney General Tom Miller, my client contact in the matter, about the stock ownership at the outset of the engagement. I had purchased the stock ten years ago and have had no transactions involving it since that time.

C. I understand that the judges on the D.C. Circuit provide the Clerk's Office with a complete list of their financial holdings and any other relationships presenting a conflict of interest. See 28 U.S.C. § 455 (specifying circumstances requiring disqualification of a judge). The Clerk's Office then screens incoming cases to ensure that no case posing a conflict is routed to a judge. As a second layer of protection, D.C. Circuit rules require parties to disclose all entities with an interest in the litigation on a form at the beginning of each filing. See D.C. Cir. Rules 12(f), 15(c), 26.1. The judges can then double-check that disclosure to ensure that they do not participate in a case presenting a conflict. I would follow these procedures, and would also make my clerks aware of my conflicts list, as an additional layer of scrutiny to ensure conflicts are avoided.

2. If you are confirmed, how would you engage in statutory interpretation? What do you believe is the proper way to determine congressional intent? Do you believe that legislative history plays a role in such assessments?

RESPONSE: The Supreme Court has provided ample guidance on how to engage in statutory interpretation. The task begins, of course, with the language chosen by Congress. As a unanimous Supreme Court has explained, however, "Over and over we have stressed that '[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 455 (1993) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)). As the Court put it, "Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." Id. (quoting United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)).

The process by which a statute evolved -- its legislative history -- is an appropriate source for guidance in construing ambiguous statutory language. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 274 (1974) (referring to "the importance of legislative history"). This includes committee reports and other legislative materials, which can help furnish an informed understanding of what Congress was trying to accomplish in a statute. Such materials must be handled with care and with an appreciation of the nature of the legislative process. For example, committee reports generally carry more weight than the remarks of a single legislator, and comments by the opponents of legislation as to its meaning are not as probative as the comments of supporters. And, of course, the principal use of legislative history is to clarify ambiguity -- not to contradict plain statutory language. The over-all guiding principle was articulated by chief Justice Marshall nearly two centuries ago: In the attempt "to discover the design of the legislature," we must "seize every thing from which aid can be derived." United States v. Fisher, 2 Cranch 358, 386 (1805).

In a case in which the court is called upon to rule on the validity of an agency's construction of a statute in a regulation, the familiar two-step Chevron analysis applies. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). Under step one, if the court determines that "Congress has directly spoken to the precise question at issue," then the inquiry is at an end, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. If Congress has not directly spoken to the precise question at issue, but has instead left it to the agency to fill in the gaps in the statutory scheme, a reviewing court "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The D.C. Circuit has considerable experience and precedent in applying the Chevron approach.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR HERBERT KOHL

1. Court Secrecy. Mr. Roberts, at your initial confirmation hearing in January, I asked you about the use of so-called protective orders in product liability cases. I am concerned that the frequent use of these orders to seal the terms of settlements too often results in threats to public health and safety being kept secret. When I asked if you thought it was proper for courts to seal settlements in these circumstances, you responded that you had not studied the law in this area and were therefore reluctant to express an opinion about this issue.

Have you now had an opportunity to educate yourself regarding this issue? Do you now have an opinion as to the advisability of judges ordering settlements sealed which may affect the public health or safety?

RESPONSE: I have looked into this issue since the first hearing. What I have learned is that, under established D.C. Circuit precedent, "a district court's decision to seal (or not to seal) court records [is reviewed] for abuse of discretion." EEOC v. National Children's Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quoting Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991)). Yet in exercising its discretion, a district court must recognize that "the starting point in considering a motion to seal court records is a 'strong presumption in favor of public access to judicial proceedings.'" Id. (quoting Johnson, 951 F.2d at 1277). And with respect to consent decrees, "this presumption is especially strong." Id.

To determine whether the strong presumption in favor of public access can be overcome in any given case, the D.C. Circuit examines six factors: (1) the need for public access; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. See id.

(citing United States v. Hubbard, 650 F.2d 293, 317-322 (D.C. Cir. 1980)). Certainly in a case in which continued secrecy represented a threat to public health and safety, as expressed in your question, the presumption in favor of public access would be particularly compelling, and the need for such access would carry particular weight in the appropriate exercise of discretion.

2. Antitrust Settlements - Tunney Act. Mr. Roberts, when the Justice Department reaches a settlement with a party against which it has filed an antitrust lawsuit, that settlement must be submitted for public comment and reviewed by the trial judge under the Tunney Act. In recent years, many judges have taken the view that a court's authority to review an antitrust settlement under the Tunney Act is quite limited and, as long as it is in the "reaches of the public interest," it must be approved by the court. Some are concerned that such a relaxed standard of review prevents a court from carefully examining the terms of antitrust consent decrees to determine if they are truly in the public interest.

What is your view of the proper standard that a district judge should apply to reviewing antitrust settlements under the Tunney Act?

RESPONSE: In the D.C. Circuit, a district court is to "make an independent determination as to whether or not the entry of a proposed consent decree [is] in the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1458 (quoting S. Rep. No. 93-298, at 5 (1973)). This standard reflects an understanding that "Congress, in passing the Tunney Act, intended to prevent 'judicial rubber stamping' of the Justice Department's proposed consent decree." Id. (quoting H.R. Rep. No. 93-1463, at 8 (1974)). "In determining whether the decree is in the public interest," the D.C. Circuit has directed district courts to consider the factors expressly identified by the Tunney Act:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. [Id. (quoting 15 U.S.C. § 16(e)).]

The D.C. Circuit has also instructed district courts to scrutinize proposed modifications to a consent decree under the Tunney Act differently depending on the circumstances. In particular, "changes opposed by a decree party -- at least when that party is the United States -- may be denied unless there is 'a clear showing of grievous wrong evoked by new and unforeseen conditions.'" United States v. Western Elec., 969 F.2d 1231, 1235 n.7 (D.C. Cir. 1992) (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)).

3. Media Ownership. Mr. Roberts, last year you represented Fox Television in its challenge to the FCC's media ownership limits. These rules limited the number of television stations a company could own as well as prohibited cross ownership between cable television systems and broadcast television stations. This lawsuit resulted in the rules being struck down.

I am very concerned regarding the increasing level of concentration in our nation's media, and the dangers this poses for diversity of expression. Many believe that the FCC's ownership limits are essential to maintaining competition in our media, and to preserve the diversity of viewpoints so essential to the marketplace of ideas.

What is your view regarding the permissibility of government imposed ownership limits on media properties? Should those of us who believe in the importance of maintaining diversity of expression and reasonable media ownership limits be worried about your views on these issues in light of your representation of the petitioners in Fox Television v. FCC?

RESPONSE: In the case of Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), I represented petitioner National Broadcasting Company, Inc. -- not Fox Television. Petitioners Fox, NBC, Viacom, and CBS were required to file a single joint brief, but each entity was separately represented. The case primarily concerned

Section 202(h) of the Telecommunications Act of 1996, in which Congress required the FCC to review biennially its ownership rules, "determine whether any of such rules are necessary in the public interest as the result of competition," and "repeal or modify any regulation it determines to be no longer in the public interest." The FCC decided not to repeal or modify the national television station ownership rule or the cable/broadcast cross-ownership rule, and the D.C. Circuit ruled that the decision to retain the rules was arbitrary and capricious. The Court remanded the broadcast ownership rule to the FCC for further consideration, but vacated the cable/broadcast cross-ownership rule. The FCC is currently engaged in a comprehensive review of various of its ownership rules, partly in response to the court's decision.

You have asked whether "those of us who believe in the importance of maintaining diversity of expression and reasonable media ownership limits be worried about your views on these issues in light of your representation of the petitioners in Fox Television v. FCC." The answer is no. Views advanced by a lawyer representing a client -- the capacity in which I participated in the Fox Television case -- should not be ascribed to the lawyer as his personal views. That has been a guiding principle of American law since before the founding, exemplified by Boston patriot John Adams's vigorous defense of the British soldiers facing charges arising from the Boston Massacre. My duty in Fox Television v. FCC was to zealously represent my client's interests - not to express my personal views on the question presented. When I served in the Office of the Solicitor General, I was on the other side of the fence - representing the FCC in defending rather than challenging its rules - and represented my client at that time just as zealously. See, e.g., FCC v. Action for Children's Television, No. 91-952 (S. Ct. 1991).

4. **Federalism.** Mr. Roberts, in 1999 you gave an interview to NPR in which you indicated that you supported several recent Supreme Court decisions which limited the ability of citizens to sue state government in federal court. You stated that these decisions were "a healthy reminder that we're a country that was formed by states and that we still live under a federal system." He added that just because Congress has created rights enforceable against private citizens and companies, "that doesn't mean they can treat the states the same way; that the states as

co-equal sovereigns have their own sovereign powers, and that includes . . . sovereign immunity."

The federal courts have played a historic role in enforcing federal laws with respect to actions of state and local government, in areas ranging from employment discrimination, voting rights, and school desegregation, for example. I believe that the role played by federal courts has been essential in ensuring all Americans, regarding of race, religion or gender, receive equal protection of the law. Do you agree? Should your statements with regard to federalism and in support of decisions restricting the rights of individuals to sue local and state government in federal court cause us concern?

RESPONSE: I agree completely with the statement that the "federal courts have played a historic role in enforcing federal laws with respect to actions of state and local government, in areas ranging from employment discrimination, voting rights, and school desegregation, for example." I also agree completely that "the role played by federal courts has been essential in ensuring all Americans, regardless of race, religion or gender, receive equal protection of the law."

I do not have a transcript of the radio interview to which you refer, but I recall my comments as being more descriptive than "supportive" of the decisions in question. In any event, nothing in my comments casts any doubt on the vital role of the federal government in vindicating national interests, including most prominently in the area of civil rights. We do live in a federal system, but the Supreme Court recognized long ago, in the words of Justice Story: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt, that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; * * * and to give them a paramount and supreme authority." Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). That principle was tested under fire and confirmed during the Civil War, and reaffirmed in the Constitution's Civil War amendments. The Supreme Court has recognized that those enactments empower Congress, among other things, to

override state sovereign immunity when it acts pursuant to Section 5 of the 14th Amendment. The scope of that authority is currently an issue before the Supreme Court in Nevada Department of Human Resources v. Hibbs, No. 01-1368 (argued January 15, 2003). I participated in a moot court to help prepare Hibbs's counsel, who is arguing against the assertion of state sovereign immunity in that case.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO SUPPLEMENTAL QUESTIONS FROM SENATOR RICHARD J. DURBIN

1. At your April 30 hearing, you stated in an answer to Senator Kennedy: "My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I have argued in favor of affirmative action. I've argued in favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement." Please set forth the names of all cases in which you have made such arguments and provide copies of the principal briefs you filed in those cases.

RESPONSE: The leading case in which I argued in favor of environmental restrictions and against takings claims is Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002). I was retained in that case by the Tahoe Regional Planning Agency, after certiorari was granted, to argue before the Supreme Court that the agency's moratorium on development in the area around Lake Tahoe did not constitute a taking under the Fifth Amendment. Development interests on the other side argued that the moratorium was a per se taking for which just compensation was required. The Supreme Court agreed with my client's position, 6-3.

Another example of a case in which I argued in favor of environmental regulation was Michigan v. Environmental Protection Agency, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, 532 U.S. 904 (2001). That case concerned the validity of the EPA's decision during the Clinton Administration to issue the NOx SIP Call Rule, which required certain States to revise their Clean Air Act implementation plans to reduce NOx emissions that were contributing significantly to the inability of other downwind States to attain clean air standards for ozone. I represented a group of intervenors, including companies that provided electric service in the Northeastern United States, the New England Council, Associated Industries of Massachusetts, and the New Jersey Chamber of Commerce. These intervenors argued in favor of the EPA rule. The court agreed with my clients' position, and we successfully

opposed the effort of the States that had sued the EPA to obtain Supreme Court review.

I argued in favor of affirmative action in Rice v. Cayetano, 528 U.S. 495 (2000). I was retained in that case by the State of Hawaii to defend a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established for the benefit of the Native Hawaiian people. The trusts were part of a series of state and federal statutes specifically designed to benefit Native Hawaiians, who had historically been discriminated against since the arrival of western powers to the Islands. Those laws were challenged by non-Native Hawaiians as violating the Fourteenth and Fifteenth Amendments. The Supreme Court ruled against the State, 7-2, with Justices Stevens and Ginsburg dissenting. I continue to assist the State of Hawaii in related litigation pending in District Court and the Ninth Circuit.

I argued in favor of prisoners' rights under the Eighth Amendment in Hudson v. McMillian, 503 U.S. 1 (1992). I argued orally before the Supreme Court in that case on behalf of the United States as amicus curiae supporting petitioner Keith Hudson, an inmate in the Louisiana state penitentiary at Angola who had been beaten by guards. (I had not worked on the brief.) The Fifth Circuit had held that although the guards' conduct was "clearly excessive and occasioned unnecessary and wanton infliction of pain," Hudson nonetheless had no Eighth Amendment claim because his injuries were "minor" and thus did not "constitute a significant injury." The Supreme Court agreed with the position of the United States that Hudson had proved his Eighth Amendment claim and was entitled to damages, 7-2, with Justices Thomas and Scalia dissenting.

I argued in favor of antitrust enforcement in the leading case of United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir.) (en banc), cert. denied, 122 S. Ct. 350 (2001). I was retained in that case by the state plaintiffs to argue the case orally before the en banc D.C. Circuit. (I had not worked on the brief.) The issues in the case concerned whether Microsoft had violated the antitrust laws in maintaining its operating system monopoly, monopolizing the browser market, and illegally tying its browser to its operating system; whether the district court abused its discretion in evidentiary and procedural rulings and in ordering a structural remedy; and

whether extrajudicial comments by the district judge required vacatur of the judgment or removal of the judge. The en banc court affirmed in part, reversed in part, and remanded in part.

In addition, I have represented plaintiffs in antitrust cases urging enforcement of the antitrust laws on several occasions, including CSU v. Xerox Corporation, 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001); Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999); and American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich, 108 F.3d 1147 (9th Cir. 1997).

2. Mr. Roberts, by all accounts you are one of the most accomplished lawyers in the country and one of the most knowledgeable about our legal system. Let me ask you about one of the most basic rights of our legal system - the constitutional right to counsel. A recent article by Anthony Lewis in the New York Times discussed the 40th anniversary of the case Gideon v. Wainwright. He noted the fact that Jose Padilla and Yaser Esam Hamdi, two U.S. citizens, are being detained by the U.S. government as "enemy combatants" and denied access to counsel.

A. Do you believe that it is appropriate to deny access to counsel to Mr. Padilla and Mr. Hamdi?

B. Do you believe it is ever appropriate to deny the right to counsel to U.S. citizens? In what instances?

C. In the state of Illinois, 13 people on death row were released between 1987 and 2000 after they were found to be innocent. Four of the 13 were represented by counsel who were later disbarred or suspended from the practice. Do you believe that indigent criminal defendants in the United States have meaningful access to counsel?

RESPONSE: The Supreme Court just recently reaffirmed that "It is * * * the controlling rule that 'absent a knowing and intelligent waiver, no person may be imprisoned for any offense * * * unless he was represented by counsel at his trial.'" Alabama v. Shelton, 535 U.S. 654, 662 (2002) (quoting Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)). The Court has referred to the lack of counsel as

a "unique constitutional defect," Custis v. United States, 511 U.S. 485, 496 (1994), because the availability of counsel is often an essential prerequisite to the vindication of other rights -- rights an individual may not even be aware of in the absence of counsel. See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Those of us who have chosen the legal profession as our own should be particularly cognizant of the role an attorney plays in safeguarding a client's liberties.

In considering issues of the sort raised by your question, a nominee to the D.C. Circuit cannot help but recall the first major litigation in the District of Columbia courts -- the treason trial of Aaron Burr's associates Bollmann and Swartwout, who had been arrested by military order and held incommunicado without access to counsel. The founding father of the D.C. courts -- William Cranch -- dissented from a decision (later overturned by the Supreme Court) to hold the pair for trial with these words:

> In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. * * * The Constitution was made for times of commotion. * * * Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.

United States v. Bollmann and Swartwout, 1 D.C. (1 Cranch) 373 (1807).

Beyond these basic principles, however, it would not be appropriate for me to comment on the particular question of whether Mr. Padilla or Mr. Hamdi may or may not be denied access to counsel as enemy combatants, or to address whether counsel may be denied to United States citizens in hypothetical circumstances. Such issues are of course being actively litigated at present. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) is currently pending on

petition for rehearing en banc, and Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 233 F. Supp. 2d 564 (S.D.N.Y. 2003) is currently pending on the government's petition for interlocutory appeal. Related cases are pending in the courts of the District of Columbia. See, e.g., Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), currently pending on petition for rehearing en banc. (Al Odah involves three consolidated habeas petitions filed on behalf of aliens held at Guantanamo Bay.) Such issues could well come before the court for which I have been nominated. As Justice Ruth Bader Ginsburg explained during her most recent confirmation hearing, "I must avoid giving an advisory opinion on any specific scenario, because * * * that scenario might come before me. * * * I must avoid responding to hypothetical [cases], because they may prove not to be so hypothetical." Hearings, at 390.

With respect to the defendants on death row in Illinois, it certainly raises the most serious concerns whenever an individual who has progressed that far through the criminal justice system is found to be not guilty. It is good that the determination of innocence is reached before it is too late, but given the irremediable finality of capital punishment, it is to be hoped and expected that competent counsel could secure relief for innocent clients well before reaching the death row stage. The concerns are of course not limited to Illinois; just last week the North Carolina Senate voted in favor of a moratorium on executions pending a comprehensive study of the administration of its death penalty.

I have felt that, regardless of one's views on capital punishment, affording those accused in capital cases competent counsel at the outset can avoid delays and uncertainties further down the road. I have read about the situation in Illinois, and I am also aware of other reports about the generally poor quality of representation of indigent defendants. Enough has been established to make clear that indigent defendants do not always have meaningful access to competent counsel. It seems that it would be a wise use of resources to ensure competent counsel at the outset, rather than spend years and years trying to assess and address the damage caused by inadequate counsel.